

Department of Labor and Industry
Board of Personnel Appeals
PO Box 201503
Helena, MT 59620-1503
(406) 444-2718

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 40-2010

HEATHER GALLAGHER HUTZENBILER,)	
Complainant,)	
-vs-)	INVESTIGATIVE REPORT
)	AND
AMERICAN FEDERATION OF STATE,)	NOTICE OF INTENT TO DISMISS
COUNTY AND MUNICIPAL)	
EMPLOYEES, MONTANA COUNCIL 9,)	
Defendant,)	

I. Introduction

On June 3, 2010, Heather Gallagher Huntzenbiler, appearing pro se, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the American Federation of State, County and Municipal Employees, Montana Council 9, hereinafter AFSCME or Council 9, violated Montana law by failing to represent her in a complaint involving her separation from employment from the Office of the State Public Defender, hereinafter OPD.

AFSCME was served with the complaint and on June 7, 2010, Timm Twardoski, Council 9 Executive Director, filed a timely Answer to the charge denying that AFSCME had breached its obligation to represent Ms. Hutzenbiler. In particular, Council 9 argues that so far as it was aware Ms. Hutzenbiler was not terminated, but rather, Ms. Hutzenbiler resigned. Moreover, Ms. Hutzenbiler never filed a grievance within the timeframes required in the grievance procedure between Council 9 and OPD. The time for filing a grievance is now long expired.

John Andrew was assigned by the Board to investigate the charge and has communicated with the parties and exchanged information as necessary. Of particular note, in addition to the documents submitted by AFSCME and Ms. Hutzenbiler the investigator has taken notice of other documents filed with the Board of Personnel Appeals by Ms. Hutzenbiler in a separate unfair labor practice complaint Ms. Hutzenbiler filed against the OPD. Those documents also pertain to her separation from OPD and will be referenced in this report.

II. Findings and Discussion

Heather Gallagher Hutzenbiler began her employment with the OPD as an Administrative Assistant/Office Manager in the Billings office. Ms. Hutzenbiler's employment ended in January of 2010, with her final paycheck covering the period through January 29, 2010. Ms. Hutzenbiler's actual last day in the office was the morning of January 28, 2010.

Ms. Hutzenbiler's complaint with the Board of Personnel Appeals is summed up in the section of the unfair labor practice complaint form describing the details of the charge.

I was fired, without cause, and contacted Josh Jensen (local rep) to assist me and he refused to look into the matter. I then called the main office (Timm) and never received a call back. They refused to help me.

The triggering event for this unfair labor practice charge was a determination by the Unemployment Insurance Division issued on April 1, 2010. The determination held that Ms. Hutzenbiler was eligible for unemployment benefits effective January 24, 2010. The decision provided in relevant part:

You were discharged after you sent an e-mail to David Duke [Ms. Hutzenbiler's supervisor] informing him you might be resigning your position effective 5:00 p.m. Friday 01/29/2010, if that was your physician's recommendation during your medical appointment on 01/29/2010. It is understandable that your employer could assume you would be leaving when taking into consideration your earlier conversation with Barb Kain [OPD Human Resource Officer] and the fact that you appeared to be cleaning out your office. However, on 01/28/2010, when your employer ended your employment, you had not yet seen your physician, and your employer did not confirm with you that you were indeed going to leave your employment. Your employer was the moving party in this separation, and an intentional disregard of your obligation to your employer has not been established. Therefore, your discharge was not for misconduct under Unemployment Insurance Law, Section 39-51-2303 Montana Code Annotated.

Although it did not agree with its entire content, OPD elected to not appeal this decision. Thus, the decision stands as is, subject to whatever weight it might be afforded in the context of an unfair labor practice charge. In that context the finding of the Unemployment Insurance Division Claims Adjudicator was "your employer was the moving party in this separation, and an *intentional disregard of your obligation to your employer* has not been established" (emphasis added). This decision was made absent any contested case procedure and no evidentiary record of which the investigator could take notice. In the context of unemployment insurance there were no demonstrated factors to disqualify Ms. Hutzenbiler from receiving benefits. The finding of the adjudicator was just that – a finding under unemployment law that Ms. Hutzenbiler was not disqualified from receiving unemployment benefits and that can carry little weight

1 when applied to the instant unfair labor practice complaint. It is a non-appealed
2 decision under a distinct law, separate and apart from the collective bargaining statutes
3 and the duty of fair representation. That stated, the circumstances surrounding Ms.
4 Hutzenbiler's separation do relate to her unfair labor practice charge.

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6 The actual e-mail from Ms. Hutzenbiler to Mr. Duke, which Ms. Hutzenbiler contends
7 she wanted kept between her and Mr. Duke, reads:
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10 I wanted to let you know that I will be meeting with my doctor Friday morning and
11 based upon his findings will likely be resigning from my position due to health
12 issues caused by this office. My resignation will be effective Friday at 5:00 p.m.
13

14 Apparently Mr. Duke did not understand this e-mail to be confidential as he forwarded it
15 to other OPD staff, including Ms. Kain. Further, and by Ms. Hutzenbiler's own
16 acknowledgement, she was observed packing and removing personal items from her
17 office space on January 27 and 28, 2010. The result of this was that on January 28,
18 2010, OPD elected to accept what they viewed as Ms. Hutzenbiler's resignation as
19 effective on the 28th. OPD further denied Ms. Hutzenbiler access to the office computer
20 systems because of confidentiality concerns. OPD did pay Ms. Hutzenbiler through the
21 remainder of the week.
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23
24 There can be no question that on January 28, 2010, Ms. Hutzenbiler knew that the OPD
25 viewed her as no longer working for the agency. At this time, or perhaps at the latest by
26 January 29, 2010, her last day for which she was paid by OPD, the clock was ticking on
27 when a grievance concerning her separation could be filed by Ms. Hutzenbiler.
28

29 On February 1, 2010, at 9:50 a.m. Ms. Hutzenbiler e-mailed Ms. Kain and Mr. Duke
30 expressing her belief that wage payment laws were violated as well as her belief that
31 she did not resign, but rather she was terminated by OPD. In her June 13, 2010, written
32 response to the AFSCME Answer to the unfair practice charge Ms. Hutzenbiler writes:
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35 The reason why I waited until February to contact the union was because I had
36 no idea of my union rights until I spoke with my father who was part of a union in
37 Minnesota. He told me I needed to call the union right away and tell them what
38 had happened and get a mediation set up.
39

40 It is clear from phone records supplied by Ms. Hutzenbiler that she did place calls to her
41 union in February of 2010. The extent of these calls is very limited not only in terms of
42 the number of calls, but also in terms of the length of the calls as well. Nonetheless her
43 phone records do demonstrate that Ms. Hutzenbiler did call AFSCME. Her first call was
44 not until February 9, 2010. Then, at 7:23 a.m. she called the Council 9 office in Helena
45 and, according to Ms. Hutzenbiler talked to the secretary who would not give out Mr.
46 Twardoski's e-mail address, but apparently did connect her with his voice messaging.
47 Ms. Hutzenbiler then called Mr. Jensen and apparently he did return her call, something
48 he does not deny or ever did deny. In fact, Mr. Jensen recalls that in trying to find out
49 more detail on the nature of her complaint, and the end of their conversation, Ms.
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1 Hutzenbiler used words to the effect that she would no longer talk with him. Any
2 communication they might have would have to be in writing. According to Mr. Jensen
3 this would make processing her issue, and determining whether or not it was even
4 subject to the grievance procedure, extremely difficult if not all but at impossible.
5 Although the substance of the phone conversation between Ms. Hutzenbiler and Mr.
6 Jensen may be in dispute, Ms. Hutzenbiler in her complaint to the American Civil
7 Liberties Union dated 2/10/2010 does confirm (item #4 of her complaint) her demand
8 that things be in writing, and per Mr. Jensen's recollection this demand must have
9 happened during their brief phone call. Quoting the ACLU complaint:
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12 The union representative refused to speak with me about the matter [her
13 separation from OPD] and has never contacted me back after I left two
14 messages [presumably with the main AFSCME office]. I received a call from a
15 local union representative [presumably Mr. Jensen] and upon telling him that I
16 had called the head union official [presumably Mr. Twardoski] and the terms of
17 my firing he said "I don't know about this. I am going to have to look into it." as
18 though he did not believe me. I told him that I wanted all further communications
19 to be in writing and he has refused to respond to me further.
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21
22 Mr. Twardoski then apparently returned Ms. Hutzenbiler's earlier call to him. He does
23 not recall the conversation, but in response to an inquiry from the investigator Ms.
24 Hutzenbiler relates:
25

26 The incoming call on the 10th [a voice message] was from Timm and he stated
27 that he was returning my call. My next call was to Timm, returning his call. He
28 told me that Josh talked with Barb and that Barb told him I quit. Timm told me
29 that since she said this there was nothing they could do for me. I told him I was
30 fired and he said "Well, that's not what Barb said." I then told him that since he
31 was refusing to represent me in this matter I would also file suit against him. The
32 very next call was placed to the Montana ACLU (which is the 443-8590).
33
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35 From the above it is clear that AFSCME did not ignore Ms. Hutzenbiler even though in
36 her complaint she states that she called the main office and "never received a call
37 back." Ms. Hutzenbiler characterizes the response of Mr. Twardoski and Mr. Jensen as
38 lying about the calls and whether they spoke with her or not. In the view of the
39 investigator, and contrary to the assertion of Ms. Hutzenbiler, neither Mr. Jensen or Mr.
40 Twardoski were lying. They either had a differing view of what was discussed or, in the
41 view of Mr. Twardoski, simply did not recall talking with Ms. Hutzenbiler. Whatever the
42 case, these calls transpired late in the timeframes required to perfect a grievance.
43 Further, and in the view of the investigator, AFSCME could well have been left with the
44 impression that not only was Ms. Hutzenbiler dissatisfied with Council 9, but she was
45 pursuing whatever legal means might be available to her.
46
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48 When the Unemployment Insurance Division issued its determination on April 1, 2010,
49 this prompted an e-mail dated May 11, 2010, from Ms. Hutzenbiler to Josh Jensen.
50 That e-mail provided in part that the State of Montana determined Ms. Hutzenbiler was

1 fired without cause. It reiterated Ms. Hutzenbiler's contention that AFSCME had not
2 helped her and if she did not hear back she was going to the NLRB and the State of
3 Montana over her problems with AFSCME. On May 13, 2010, Mr. Jensen responded
4 by e-mail with a copy to Mr. Twardoski. The substance of the response was that Mr.
5 Jensen was unaware of Ms. Hutzenbiler filing a grievance; Ms. Hutzenbiler was no
6 longer a union member or employee covered by the collective bargaining agreement;
7 and, Ms. Kain had informed Mr. Jensen that Ms. Hutzenbiler had resigned and was not
8 terminated. On May 14, 2010, Ms. Hutzenbiler then e-mailed Mr. Twardoski to which
9 Mr. Twardoski responded,

11
12 You claim you were fired. OPD was your employer . . . not unemployment. I am
13 asking you to support your claim you were terminated. If you resigned . . . tell me
14 what part of the contract was violated.
15

16 To this Ms. Hutzenbiler responded that she called when all this happened, she was not
17 called back. In response Mr. Twardoski requested a copy of the letter of termination. In
18 fact, there was no letter of termination as OPD continues to hold that Ms. Hutzenbiler
19 was never terminated. She resigned, and thus there was no State OPD initiated letter of
20 termination.
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24 The Montana Supreme Court has approved the practice of the Board of Personnel
25 Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent
26 as guidelines in interpreting the Montana Collective Bargaining for Public Employees
27 Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598
28 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of
29 Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME
30 Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753. Thus, to the
31 extent cited in this decision, federal precedent is considered for guidance and to
32 supplement state law when applicable.
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35 Failing to process a grievance can be a breach of the duty of fair representation, the
36 basis of Ms. Hutzenbiler's complaint. As the U.S. Supreme Court has held, the duty of
37 fair representation does not require that all grievances be taken to arbitration.
38

39 "Though we accept the proposition that a union may not arbitrarily ignore a
40 meritorious grievance or process it in a perfunctory fashion we do not agree that
41 the individual employee has an absolute right to have his grievance taken to
42 arbitration regardless of the provisions of the applicable collective bargaining
43 contract." Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)
44

45 The question in this case is whether or not Council 9 ignored a meritorious grievance.
46 In attempting to answer that question a threshold issue is whether Ms. Hutzenbiler was
47 aware of her rights, or stated another way, should have been aware, of her rights under
48 the collective bargaining agreement. Related to this threshold issue is whether there is
49
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1 any reason why a grievance was not filed as it is clear one was not and it is equally
2 clear that the timeframes in the grievance procedure have been missed.
3

4 On December 14, 2009, Ms. Hutzenbiler e-mailed Josh Jensen, AFSCME Eastern
5 Region Field Representative, at 10:22 a.m. asking, "If we tell you things do you keep
6 notes in a file or anything?" Sixteen minutes later Mr. Jensen responded, "Is there
7 something you need or something I can help you with?" to which Ms. Hutzenbiler
8 responded "Doubtful. I just want to make a complaint of the way I am treated but not
9 like it will matter that is why I want it documented somewhere other than my own
10 personal files I keep". Mr. Jensen responded two minutes later asking "What kind of
11 complaint do you have?" At 10:44 a.m. Ms. Hutzenbiler answered with a response
12 including references to being treated "unfairly" and undue stress because of "This place
13 and the way people treat me". At 11:29 a.m. on December 15, 2009, Mr. Jensen
14 responded saying in relevant part, "If there is something concrete that you can tell me
15 that violates the collective bargaining agreement, I will surely help you out." Mr. Jensen
16 also expressed his concern about other statements in Ms. Hutzenbiler's e-mail and
17 suggested possible avenues of assistance she might explore. At 1:09 p.m. the same
18 day Ms. Hutzenbiler responded in part stating, "This is an awful place to work because
19 of the way I am treated." She also indicated, "I will have to review the collective
20 bargaining agreement to see if anything is in there."
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24 The above demonstrates several things, one being that Ms. Hutzenbiler was aware
25 there was a collective bargaining agreement and she must have known how to access it
26 to verify its contents if she was going to review it. Beyond this, she knew how to reach
27 Mr. Jensen by e-mail as well as by phone. From the standpoint of AFSCME it also
28 verifies an ongoing issue between Council 9 and Ms. Hutzenbiler, namely that the
29 concerns she often brought to the attention of Council 9 were issues of a nature not
30 addressed in the collective bargaining agreement nor of a mandatory nature in terms of
31 overall coverage of the collective bargaining act for public employees. Because of this,
32 AFSCME asked that Ms. Hutzenbiler be mindful that not every issue arising in the
33 workplace could be addressed by Council 9.
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36 Ms. Hutzenbiler was aware there was a grievance process and she even knew how to
37 look up the collective bargaining agreement to see what that process was. OPD
38 indicates the bargaining agreement is available to employees on the intranet and they
39 are aware of its existence. The investigator actually looked on line and had no difficulty
40 locating the agreement on a Department of Administration website. Of particular note,
41 not only is the contract available on line, but the grievance procedure is a specific
42 addendum to the contract and the actual Council 9/OPD grievance form follows the
43 grievance process as its own specific addendum to the contract. Both the grievance
44 process form and timelines for processing grievances are readily available. They are
45 also easy to understand.
46

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48 Beyond the availability of information one must look to the very documents offered by
49 Ms. Hutzenbiler to see what, if any knowledge she had of union contacts and union
50 processes.

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2 In her June 13, 2010 written response to the Council 9 Answer to the unfair labor
3 practice charge Ms. Hutzenbiler states:
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5 "I do not even know who the union steward is and quite frankly I was so shocked
6 that I didn't know anything about the union.
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9 The information reviewed by the investigator contradicts this assertion. Again referring
10 to the documents relating to her unfair labor practice complaint against OPD - Ms.
11 Hutzenbiler's Exhibit 22 -, e-mails between Ms. Hutzenbiler and Michael J. Sherwood,
12 Public Defender Commission Chair at the time, concerning workplace issues were
13 copied to Josh Jensen as well as Gary Quigg, an active union member in the Billings
14 office of OPD. These e-mails were exchanged in October of 2009 and demonstrate
15 knowledge of union representatives and activists in the Billings area. Parenthetically, as
16 pointed out by Council 9, and as easily determined by the investigator, one of the
17 attorney bargaining unit members in the Billings office is an executive board member of
18 Council 9. Again this was easily ascertained and it stretches belief that Ms. Hutzenbiler
19 "didn't know anything about the union".
20

21
22 Again referring to Ms. Hutzenbiler's own filings against OPD, her Exhibit 17, is the
23 response of Barb Kain to a non-union grievance filed by Ms. Hutzenbiler. In
24 background, at the time this grievance was filed Ms. Hutzenbiler had undergone a
25 change in job duties. Her previous position was not in the bargaining unit and she had
26 not gained permanent status with OPD. Her new position was in the bargaining unit but
27 again, she had not attained permanent status. As a probationary employee she did not
28 have access to either grievance procedure, but nonetheless filed the non-union
29 grievance. Ms. Kain's February 10, 2009, letter points this out to Ms. Hutzenbiler. It
30 further addresses her workplace concerns and is copied to AFSCME. Once again, it
31 cannot be disputed that knowledge of Council 9's involvement in the workplace had to
32 be known by Ms. Hutzenbiler.
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34
35 Relating to her Exhibit 17 is Exhibit 15, the attachment to the non-union grievance form.
36 The attachment provides in relevant part:
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38 I told her I had been in touch with the union concerning the letter which seemed
39 to make her upset. She told me that since I had not filled out the union
40 information that I would not be represented under the union. It should be noted
41 that no one has ever provided me information concerning the union although I
42 am sure that the fees would be taken out of my pay.
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45 In fact, Ms. Hutzenbiler did become a dues payer and once more her professed lack of
46 knowledge of the union and its processes is suspect.
47

48 The above are but some examples that demonstrate to the satisfaction of the
49 investigator that Ms. Hutzenbiler had actual knowledge, and certainly constructive
50 knowledge at the least, of not only the presence of the union in her workplace but the
basic structure of the organization, and contacts within the organization. She also had

1 access to the collective bargaining agreement and knew its contents, or certainly could
2 have determined its contents. Her representations to the contrary, Council 9 did not
3 refuse to assist her, and even if they had, arguendo, there is nothing presented to the
4 investigator that would have stopped Ms. Hutzenbiler from filing a grievance on her own
5 volition under the collective bargaining agreement. She simply failed to do so. In the
6 absence of that, and further based on all that was reviewed by the investigator, there is
7 nothing to demonstrate that AFSCME Council 9 failed Ms. Hutzenbiler in its duty of fair
8 representation.
9

10 **III. Recommended Order**

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12 It is hereby recommended that Unfair Labor Practice Charge 40-2010 be dismissed as
13 without merit.
14

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16 DATED this 14th day of July 2010.
17
18

19
20 BOARD OF PERSONNEL APPEALS
21

22
23 By: _____
24 John Andrew
25 Investigator
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27

28 NOTICE

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30 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
31 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
32 may be appealed to the Board. The appeal must be in writing and must be made within
33 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
34 Board at P.O. Box 201503, Helena, MT 59620-1503. If an appeal is not filed the
35 decision to dismiss becomes a final order of the Board.
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CERTIFICATE OF MAILING

I, _____, do hereby certify that a true and correct copy
of this document was mailed to the following on the _____ day of _____
2010, postage paid and addressed as follows:

HEATHER GALLAGHER HUTZENBILER
1151 HOWARD AVE #4
BILLINGS MT 59102

TIMM TWARDOSKI
AFSCME MT COUNCIL 9
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